

Capability Policy

Part B – Code of Practice

Sept 2021

Version 2

1. Introduction

This code of practice is for Line Managers responsible for dealing with the minority of staff who, following completion of probation, are failing to meet acceptable standards of work performance. This code must be read in conjunction with Expanse Learnings Capability procedure.

This procedure should only be used after the employee has been fully briefed on the job expectations, the issues for improvement, and offered meaningful training and advice. It should be borne in mind that there may be exceptional occasions when progress through the procedure may be accelerated (e.g. a serious breach of safety rules endangering the health and safety of others).

A general point to note is that failure to follow Expanse Learnings Procedures could render any subsequent action against the employee to be considered unfair, and action being taken against the company. Therefore, it is essential that the Procedure is followed.

Every Line Manager/supervisor is responsible for ensuring that each of their staff are aware of the standards of work performance expected of them. The Capability procedure applies only to work performance issues where the employee is not meeting acceptable standards. There is a separate procedure for dealing with misconduct (disciplinary procedure) and for performance issues related to long term ill health and short term/frequent absences (Sickness Absence Policy & Procedure).

Is it capability or lack of capability due to apparent ill health, or is it misconduct?

It is not always easy to decide whether a person's poor performance is due to misconduct, capability or an absence issue.

Capability is usually defined as the skills, aptitude and qualifications or other physical or mental qualities necessary to adequately carry out the duties of the post in which the member of staff is employed. You need to consider why the employee cannot do the job:

- Is it that they are inherently incapable of performing as required?
- Are they unable to achieve the required standard despite making an effort to do so?
- Is there a persistent failure to obtain the necessary qualifications and so the full potential of the job cannot be realised?
- Is there a need for training or education of the employee which can be provided in a reasonable time scale?

Lack of capability due to apparent ill health or a disability

This is a difficult area and as a caring employer Expanse Learning would be reluctant to take any action that could ultimately lead to the dismissal of an employee who is genuinely ill and/or has a disability. We are also required by the Disability Discrimination Act to take an employee's disability into account and to seek to make "reasonable adjustments" which could allow the employee to continue in employment. However, in some cases it may not be practicable to continue to hold a post for an employee whose performance or attendance is such that they cannot fulfil their duties. Grounds which may lead to dismissal in the case of ill health could fall into two categories, long term sickness or persistent frequent/short term absences.

2. Misconduct

You need to know why the employee is not willing to do the job:

- Are they failing to meet the required standard of performance through their own carelessness/negligence?
- Are they failing to operate at their full potential the abilities that they possess?

What causes under performance?

When dealing with poor performance a Line Manager must consider the cause. It is important to establish as far as possible, the reasons for the performance so that appropriate support can be provided.

The causes could relate to:

- **Skills & Knowledge** – do they have the necessary knowledge and/or skills to do the job? You need to consider for instance, is the lack of knowledge due to poor recruitment, or have the needs of the job changed over time. In these circumstances, it may be appropriate to consider targeted training in specific skills/knowledge areas.
- **Problems outside work** - Work performance can be affected by factors outside of work, e.g. family illness, financial difficulties, the breakdown of a relationship. As the individual's Line Manager, you should explore such

issues sensitively and consider what support can be provided, e.g. an employee may need some time off to adjust to significant life changes, counselling may be appropriate, or possibly referral to Occupational Health.

- **Factors inside workplace** - Work performance can also be affected if an employee is being harassed or bullied. Again, this needs to be handled sensitively. Should an employee advise that this is the situation, Expanse Learning has appropriate policies to deal with such matters, e.g. dignity at work and/or disciplinary procedure. Should an allegation relate to the Line Manager, then arrangements should be made by HR to organise another appropriate member of staff to continue to deal with this matter.
- **Lack of information, materials, education or training** - If a person has not been fully trained, equipped or educated they may be unable to meet the otherwise reasonable expectations of their role. Training or equipment needs may have to be identified and discussed.

What mechanisms are available to support the employee?

It is important when capability issues arise, that the nature and cause of underperformance is identified so that appropriate support can be provided, and the problem corrected. It is essential that as the Line Manager you draw up a programme of action and support. Below are some suggested support strategies. Not every strategy will be appropriate in every case, although regular meetings and training are likely to form part of any support package:

- **Regular planning meeting with Line Manager** - This allows problems to be discussed, solutions identified and for progress to be monitored. You will need to consider how frequently these meetings should take place, for instance they may need to take place monthly, fortnightly or weekly, depending on the timescale agreed for allowing the required standard of performance. Regular planning meetings allow for difficulties to be identified and resolved at an early stage.
- **Work Observation** - It may be appropriate for the Line Manager/supervisor or other appropriate person to directly observe the work performance of an employee. Any observation would only be following appropriate advance notice to the employee. Normally verbal feedback should be given immediately following the observation to the employee, followed by a written report.
- **Training** - Reasonable training may need to be provided, this may include, short courses, distance learning or 'on the job' training.
- **Technology/Equipment** - Where necessary and reasonable the introduction of new technology/equipment may assist an employee in performing his/her duties. It is important that appropriate training be given.
- **General Resources** - Is the range of resources, e.g. people, financial, physical, available to the employee adequate and appropriate to the job?
- **Work Shadowing** - Would the employee benefit from observing the work of others, inside or outside Expanse Learning – this could include a period of work shadowing.
- **Mentor/Buddy System** - Would the employee benefit from a member of staff (other than their Line Manager) being assigned as a mentor or buddy? They would have expertise in a particular area(s) of concern and would provide advice to the employee.
- **Self Help** - Encourage the employee to identify areas in which she/he considers support is required, and to identify how this support could be delivered.
- **Variation to Job** - Where a member of staff fails to attain or maintain the required standards it may only be in a part of their overall duties and it will not necessarily undermine their capability to undertake a significant element of their job. In these cases, consideration, where appropriate, should be given to changing their involvement in that part of the job. This consideration should be given at all stages in this procedure.

The suggestions provided above are for information only so that Line Managers can be as well informed as possible, but they should not be seen as exhaustive or indeed mandatory. Each case should be considered on its own merits, and it will not always be appropriate to deal with each case in exactly the same way and this also extends to the type of support provided. Line Managers should not feel obliged to offer all of the suggested support listed above and neither should members of staff expect that all this support is available to them; the key consideration is reasonable support.

3. Review Periods

What is a reasonable period to provide an employee with adequate opportunity to improve or sustain their performance?

The timescales adopted for the various stages of this procedure will vary in accordance with the seriousness of the problem, the member of staff's role, whether the problem relates to a specific or broader difficulty, and the time period which the problem has existed. In certain cases, for example, where the provision of an important service is jeopardized, the period given for improvement may need to be quite short. The review period agreed at the informal stage or stage 1 or 2, i.e. the period the Line Manager will monitor and assess the member of staff's performance should normally range

from between two to twelve weeks. It will be for the Line Manager to determine what is a reasonable period, for example a receptionist having difficulty performing to a satisfactory standard may only require a two week period to assess and monitor their performance, whereas a Teacher who is not delivering in terms of publications or the submission of grant proposals may need a period of months to be provided with sufficient time to improve.

Where does Staff Development Review (SDR) fit with this process?

SDR meetings occur termly and provide an opportunity to allow structured discussions about performance, development and review between a member of staff and their Line Manager. If there are any issues to do with performance, they should not be stored up for the annual meeting, however once performance issues have been raised, they should be referred to within the SDR meeting, which should continue as normal.

4. Preparing for Meetings

What you should consider when arranging meetings under the Capability Procedure:

- Tell the employee what the meeting is about. For formal meetings this should be done in writing, confirming the date, time, purpose and location of the meeting.
- For formal meetings give appropriate notice – do not ‘spring’ a meeting on an employee. Account must be taken of the requirements set out on scheduling of meetings as contained in the General Principles section in the capability procedure.
- Ensure the room to be used is private and interruption free.
- Prepare in advance by identifying the areas of underperformance and gather sufficient information/supporting evidence to enable a fair and informed decision.
- Inform the employee of the areas of underperformance and where applicable supply them with copies of the relevant documents/evidence.
- Consider whether any support mechanisms may be available.
- Give some consideration before the formal meeting to an improvement plan, including appropriate timescales and the frequency of monitoring meetings.
- Advise the employee of their right to be accompanied by a trade union representative or a work colleague to formal meetings.

Prior to the discussion with the employee the Line Manager should fully prepare by considering a number of points including but not exhaustively:

- What is the nature of the job and the specific tasks and responsibilities?
- How will the employee know this? Example by reference to job description, EDR records, etc.
- What are the required standards?
- Are the standards appropriate to the level and nature of the job?
- Have proper equipment, support and other facilities been provided? - Has the employee received appropriate development?
- Is there adequate support, assistance and supervision?
- What additional support would help the employee for example, Occupational Health Services, Counselling, or mentoring?
- Is the employee’s physical or mental health a factor?
- Are there actions taken by the employee’s Line Manager which may prevent the employee from working effectively?
- Are there organisational factors impacting on the employee, e.g. high sickness or poor performance levels within the team, unclear procedural requirements?
- Are there external factors impacting on the employee e.g. availability of external grant funds, issues with collaborators?
- Are there personal circumstances that should be taken into account?
- What can reasonably be done to enable, encourage and empower the member of staff to attain the required level of performance?

5. How to conduct meetings

A Line Manager should:

- Provide the employee with a copy of the procedure
- Make allowances for the employee to be concerned and anxious.
- Plan breaks and be prepared to adjourn the meeting if necessary

- At the formal stages arrange for a private room to be available where the employee can confer with his/her trade union rep, or work colleague.
- Ensure the employee has every opportunity to state his/her view
- Where appropriate ensure all those present are introduced, with their roles explained and state the purpose of the meeting.
- Keep control of the meeting and ensure you cover all the issues and agree an improvement plan.
- At the end of the meeting summarise what has happened and what will happen.
- At the end of the formal stages confirm the right of appeal.

6. Note taking at meetings

It is important that notes are kept of all meetings, both informal and formal meetings. At formal meetings, the HR Administrator should accompany the Line Manager to take notes. Advise the employee that he/she will be sent a copy of the notes for information. If the employee disagrees with the notes, then he/she should be advised to set out the disagreement and forward to the HR Administrator and the Line Manager. A copy of the notes of the meeting (both the informal and formal meeting) together with the improvement plan should be sent to HR for information.

7. Improvement plans

The improvement plan should clearly set out the required standards of performance and what action is required by the employee to achieve those standards. It should also set out the support mechanisms and the review period should be clear. The improvement plan should be outlined at the meeting, where possible obtaining the employee's agreement to it. A copy of the improvement plan should be sent to the employee, HR and the Line Manager.

8. Informal Action

Informal consultation provides an opportunity to discuss a problem with an employee and to try and jointly find a solution. It provides an opportunity to rectify situations before it is necessary to enter the formal stages. Its intention is to improve performance.

9. Conducting an Informal Meeting

Where a performance issue is identified, the Line Manager must establish the facts and gather information to ensure that he/she is clear about the problem, with supporting evidence where available. The Line Manager needs to consider this information and decide whether or not it is appropriate to have an informal discussion, or if the matter is sufficiently serious to go straight to the formal stages. The purpose of the informal meeting is to deal with the substandard performance without starting the formal procedure.

At the informal meeting the Line Manager will:

- Explain how the performance does not reach acceptable standards.
- Clarify (if necessary) what the required standards are. - Provide the employee with the opportunity to respond.
- Explain that the meeting is not part of the formal process but that if matters do not improve the formal procedure may be adopted.
- Identify any support that may assist.
- Offer guidance and encouragement.
- Outline the improvements required and the timeframe.

The Line Manager should keep a note of the meeting, sending a copy to the employee together with an improvement plan as appropriate. A copy of the notes and improvement plan should also be sent to HR and the Line Manager.

10. Formal Action

The formal procedure is to be used when an informal approach has failed or if the matter is serious and it is appropriate to immediately use the formal procedure. You should discuss the situation with the HR Administrator before proceeding to the formal stages.

Normally all stages of the Capability Procedure will be followed but in certain cases, where the actual or potential consequences of the poor performance are very serious, for example contravention of a safety rule which endangers the health and safety of others then adopting the whole of the procedure may not be appropriate. In exceptionally serious cases where dismissal is a possibility, the procedure may commence at stage 3 but before moving directly to this level, you must consult with HR.

11. The right to be accompanied at Formal Meetings

When arranging formal meetings, Line Managers should take account of the requirements set out on rights of representation in the General Principles section of the procedure which, amongst other things, sets out the role of the union representative or a work colleague at a formal meeting.

12. Appeals

All employees have the right to appeal against any decision made at any of the formal stages in the Capability Procedure. All appeals should be made in writing outlining the reasons for the appeal, to the Head of Corporate Services within 10 working days of a formal meeting or hearing. The letter confirming the Line Manager's decision must set out the fact that the employee has a right of appeal and how that right may be exercised. Appeals will be heard as soon as practicably possible and normally within 15 working days of receipt of the appeal letter.

Appeal hearings against formal cautions or dismissal will consist of a formal interview conducted by a single person (adjudicator) nominated by the Head of Corporate Services who will be a Line Manager senior in authority to, or at the same level as, the Line Manager who applied the sanction and will not have been previously involved in the case and will involve the employee and the Line Manager who took the decision/action resulting in the appeal. The employee may be accompanied by a trade union representative or a work colleague.

13. Formal Procedure

Stage 1 - Formal Interview

A Line Manager must write to the employee after the first formal meeting confirming what has taken place. This letter should be sent as quickly as possible and the following information should be included:

- The reason for conducting the formal interview
- Employee's acknowledgement of lack of capability (if made)
- The improvement plan, including any assistance offered.
- Details of any alternatives to implementation of the Capability Procedure that were discussed and/or being considered.
- Details of the review dates and the monitoring process.
- The consequences of failure to improve (i.e. that the next stage of the procedure will be implemented and that the employees continued employment could be at risk.
- The right of appeal and how it may be exercised.

Stage 2 – Formal Review

This meeting takes place at the end of the review period and provides an opportunity for the Line Manager and the member of staff to review performance to date against the improvement plan. The possible outcomes of the meeting and the appropriate responses may include:

- All targets met and employee performing at a satisfactory standard: no further action required.
- Significant progress made but further limited support required to secure permanent satisfactory standard: extension of review period.
- Targets not met or mitigating circumstances (e.g. ill health or non-provision of a vital part of the agreed support package): extension of review period.
- Targets not met: notify the employee that performance remains unsatisfactory and will continue to be monitored against the improvement plan. Consider revising the improvement plan. Consider alternative options listed in the procedure. Warn employee that if there is no substantial improvement after a further period of monitoring, further formal action will be taken that ultimately could lead to dismissal on grounds of capability.

The Line Manager must write to the employee including confirmation of the information set out above in stage 1, setting out what has taken place under stage 2, and detailing possible further action.

Stage 3 – Final Review

This review meeting will be chaired by a more senior level of management than the one who handled the case up to this stage. The outcomes of this review meeting and appropriate responses are likely to include:

- Targets met and employee performing at a satisfactory standard: no further action required.

- Significant progress made but further limited support required to secure permanent satisfactory standard: extension of review period.
- Targets not met due to mitigating circumstances (e.g. ill health or vital part of the agreed support package not provided): extension of review period.
- Targets not met - employee notified that the performance remains unsatisfactory and that dismissal on grounds of capability is to be considered.

If dismissal is being considered, then the meeting should be adjourned so that the Line Manager may consider all of the circumstances of the matter. The employee must be given the opportunity to comment and make representations.

Factors that may be relevant for consideration by the Line Manager:

- Has the employee been victimised?
- Is his/her standard of work performance no worse than that of other employees?
- Has a consistent message been put across to the employee? What have performance ratings, PDR, etc, stated?
- Has the employee been given appropriate and reasonable training and support? - Has the employee been warned as to the seriousness of the situation?
- Has the employee been given sufficient opportunity to achieve a satisfactory standard?
- Is there evidence (e.g. written notes, copy letters etc.) that the action that has been taken is in accordance with the Capability Procedure?
- Has the employee been given proper opportunity to comment on matters including the process that has been followed?
- Are there any appropriate alternative options? Example: change of grade or transfer to an alternative position. It is important that alternatives have been fully explored before reaching the final review stage. The Line Manager may need to adjourn the meeting to investigate whether any part of the alternative options is available.

If none of the alternative options are available, or appropriate then the decision will be to dismiss on the grounds of capability. The Line Manager will reconvene the meeting and inform the employee of his/her decision. Where the decision is that the employee is incapable of meeting reasonable performance expectations of their present position, but could meet the performance expectations of another position, a further meeting will take place within 10 working days between the employee, the Head of Unit, and an HR representative with a view to finalising and agreeing a revised job description and grading or confirming a mutually acceptable opportunity for transfer to a lower graded job to which the employee will be transferred at the associated salary. Where no such opportunity has been identified the employee may be notified by the Line Manager chairing the review that he/she is dismissed on the grounds of capability in accordance with the notice provisions in their contract of employment. They must be advised in writing of their right of appeal. Redeployment opportunities should continue to be sought during the employees notice period.

14. Confirmation of the Final Review

In the letter confirming the outcome of the meeting, the following information should be included:

- A summary of the discussion
- Details of the options explored and reasons why they are not suitable.
- Details of the employee's right of appeal.